

**SURREBUTTAL TESTIMONY**  
**AND EXHIBITS**  
**OF**  
**STEVEN W. HAMM**  
**ON BEHALF OF**  
**THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF**  
**DOCKET NO. 2018-319-E**  
**IN RE: APPLICATION OF DUKE ENERGY CAROLINAS, LLC**  
**FOR ADJUSTMENTS IN ELECTRIC RATE SCHEDULES AND TARIFFS AND**  
**REQUEST FOR AN ACCOUNTING ORDER**

**Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND OCCUPATION.**

**A.** My name is Steven W. Hamm. My business address is 1401 Main Street, Suite 900, Columbia, South Carolina 29201. I am employed by the State of South Carolina as Special Counsel and Senior Advisor, in the Legal Department of the South Carolina Office of Regulatory Staff (“ORS”).

**Q. HAVE YOU PREVIOUSLY APPEARED BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA?**

**A.** Yes. I appeared as Legal Counsel in my first contested case hearing before the Public Service Commission of South Carolina (“Commission” or “PSC”) over 40 years ago, in the summer of 1978. At that point, I served as State Deputy Consumer Advocate and head of the newly created Division of Consumer Advocacy at the South Carolina Department of Consumer Affairs. I was named Administrator and State Consumer Advocate for the Department in 1981 by the Commission on Consumer Affairs. I served

1 at the Department of Consumer Affairs for almost 18 years and left the Department to enter  
2 the private practice of law in 1994. I represented many regulated entities before the  
3 Commission during my 24 years in private practice. I have appeared before the  
4 Commission in various types of regulatory proceedings. I left private practice and joined  
5 ORS in September 2018.

6 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

7 **A.** The purpose of my surrebuttal testimony is to address the regulatory policy issues  
8 related to certain legal expenses sought by Duke Energy Carolinas, LLC (“DEC” or  
9 “Company”) which are addressed in the rebuttal testimony of DEC witness Kim Smith and  
10 Dr. Julius Wright. I will discuss why ORS recommended the Commission disallow cost  
11 recovery from customers for those identified legal expenses.

12 **Q. HAS REGULATORY PUBLIC POLICY CHANGED AND EVOLVED DURING**  
13 **YOUR CAREER OF APPEARING BEFORE THE COMMISSION?**

14 **A.** Yes. I have been directly involved in working to shape and revise the regulatory  
15 public policy standards that serve to guide the Commission in evaluating rate making  
16 positions advanced by regulated companies. Rulings by the South Carolina Supreme Court  
17 in response to appeals of Commission orders have been a significant factor in how the  
18 Commission decides contested issues.

19 **Q. WHAT CHANGES HAVE YOU OBSERVED DURING THE PAST 40 YEARS OF**  
20 **APPEARING BEFORE THE COMMISSION?**

21 **A.** The Commission has modified policy positions in response to efforts by regulated  
22 companies to claim that a utility should be able to recover all costs of operations from  
23 ratepayers, regardless of who actually benefitted from those expenses.

**Q. CAN YOU PROVIDE THE COMMISSION WITH AN EXAMPLE?**

**A.** Yes. In a recent Carolina Water Service, Inc. (“CWS”) rate case, the Commission addressed whether the contested proposed legal expenses should be paid by customers. Based upon the record testimony and evidence, the Commission ruled that certain CWS litigation expenses should be assigned to stockholders and not customers.<sup>1</sup>

**Q. HOW WOULD YOU DESCRIBE THE CURRENT LEGAL EXPENSE REGULATORY POLICY ADOPTED BY THE COMMISSION?**

**A.** I believe the current Commission approach to examine proposed legal expense recovery is focused on a determination of whether the underlying legal expenses in question should be paid by customers. The Commission regulatory policy includes an examination of the legal expenses to determine if the Company’s legal costs and expenses were the result of management decisions and whether the Company achieved an outcome that provided an economic benefit to customers from the litigation. Said another way, the Commission will generally not include legal costs and expenses in rates paid by customers in legal disputes in which the Company was found at fault and was unable to demonstrate its achievement of an outcome that provided economic benefit to its customers.

**Q. WHY SHOULD MANAGEMENT DECISIONS AND ACTIONS AFFECT WHETHER OR NOT PROPOSED LEGAL EXPENSES SHOULD BE RECOVERED BY CUSTOMERS?**

**A.** The rates and charges for public utility service in South Carolina are required by law to meet the regulatory standard of being both fair and reasonable to customers and provide a reasonable rate of return to Company investors. Company management is

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<sup>1</sup> Docket No. 2017-292-WS – Order 2018-802

1 required to take steps to comply with all applicable legal and regulatory requirements.  
2 Final Commission orders must reflect a proper balancing of Company and customers'  
3 interests which now require a full examination of why those expenses were incurred in the  
4 first place. The South Carolina Supreme Court has confirmed and ruled that the  
5 Commission has the regulatory authority to reject portions of expenses previously incurred  
6 by a regulatory utility.<sup>2</sup>

7 **Q. HOW DOES DEC ATTEMPT TO SUPPORT PAYMENT OF COAL ASH**  
8 **LITIGATION COSTS?**

9 **A.** DEC filed Direct and Rebuttal Testimony for Dr. Julius Wright that briefly  
10 addressed coal ash legal costs related to insurance recovery litigation and the legal defense  
11 costs of North Carolina enforcement action.

12 **Q. DOES DR. WRIGHT PROVIDE ANY SPECIFIC LEGAL DATA OR**  
13 **INFORMATION TO JUSTIFY COAL ASH RELATED LEGAL EXPENDITURES**  
14 **BY DEC?**

15 **A.** No.

16 **Q. PLEASE EXPLAIN:**

17 **A.** Dr. Wright makes no attempt to justify that DEC wants its customers to pay all  
18 legal costs. The broad assertion is made that "legal fees should be recoverable because they  
19 represent a legitimate, reasonable and prudent business expenditure".

20 **Q. WHAT OTHER BASIS DOES DR. WRIGHT OFFER TO THE COMMISSION?**  
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<sup>2</sup> *Utilities Services of SC v. SC Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011).

1 A. He also makes a general statement that “The company must be afforded the  
2 opportunity to defend itself from lawsuits especially from non-governmental related  
3 parties...”

4 **Q. DOES ORS’S PROPOSED DISALLOWANCE PREVENT DEC FROM**  
5 **DEFENDING ITSELF FROM LAWSUITS?**

6 A. No.

7 **Q. PLEASE EXPLAIN.**

8 A. DEC has provided no substantive information for any coal ash litigation expenses  
9 to justify customers being responsible for legal fees and costs. Every proposed legal  
10 expense is always subject to a disallowance by the Commission based on a variety of  
11 considerations.

12 **Q. HAS THE COMMISSION DISALLOWED LEGAL EXPENSES?**

13 A. Yes.

14 **Q. PLEASE EXPLAIN.**

15 A. The Commission recently disallowed certain legal expenses requested by CWS in  
16 a Reconsideration Order issued on January 25, 2019. The Commission declined to force  
17 customers to pay for the Company’s legal expenses related to its failure to successfully  
18 overturn a federal court decision finding the Company in violation of the Clean Water Act.<sup>3</sup>

19 **Q. HAVE YOU EXAMINED LITIGATION RELATED COSTS AND EXPENSES**  
20 **SOUGHT BY DEC IN THIS DOCKET?**

21 A. Yes.

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<sup>3</sup> Docket No. 2017-292-WS – Order 2018-802

**Q. SHOULD THE COMMISSION APPROVE ALL DEC LEGAL EXPENSES SOUGHT IN THIS PROCEEDING?**

**A.** No.

**Q. PLEASE EXPLAIN YOUR RESPONSE TO THE COMMISSION.**

**A.** As an initial policy approach, the Commission must first determine if the Company's proposed legal expense should even be considered as a ratemaking operating expense to be included in rates authorized by the Commission. "When litigation involves claims asserting failure of the utility to adhere to state or federal law, we must look carefully at the matter to determine whether expenses associated with defending the action should be included in rates paid by customers." Docket No. 2017-292-WS, Order No. 2018-802 p.16

**Q. ARE YOU SUGGESTING THAT A REGULATORY UTILITY MUST MEET A PERFECTION STANDARD IN ORDER TO OBTAIN COST RECOVERY FROM THE COMMISSION?**

**A.** No. The Commission has many years of experience examining complex cases from regulating a wide range of regulated entities. What has changed over my 40 years of experience before the Commission is the Commission now demands greater accountability before it approves Company requests for rate adjustments.

**Q. PLEASE EXPLAIN THE LITIGATION EXPENSES AT ISSUE IN THIS RATE PROCEEDING.**

**A.** DEC seeks ratepayer recovery of coal ash litigation expenses. Most notable is the extremely summary explanation provided by DEC to ORS discovery inquiries. DEC provided the very same limited written justification for several legal invoices for coal ash

litigation expenses. The description of services for the legal invoice, as provided by DEC in its response to ORS states [REDACTED]

[REDACTED] Exhibits SWH-1 – SWH-4.

**Q. ARE THERE ANY OTHER DEC SUMMARIES FOR OTHER COAL ASH LEGAL EXPENSES?**

**A.** Yes. DEC provided the following brief justification regarding 5 other listed coal ash legal expenses. The description for services performed stated [REDACTED]

**Q. PLEASE EXPLAIN WHY ORS RECOMMENDS THE COMMISSION EXCLUDE FROM COST RECOVERY OF COAL ASH LEGAL INVOICES.**

**A.** DEC has not provided the Commission or ORS with any clear and detailed information supporting its claim for recovery of hundreds of thousand dollars of coal ash litigation expenses. The brief DEC explanations merely advise the Commission that DEC is defending unnamed Company actions related to coal ash cases filed against DEC. The Commission only knows that DEC believes there may be “*potential*” insurance recovery for coal ash” (emphasis added). However, no insurance recovery has been received by DEC or shared with customers as of the date of this testimony. DEC has not demonstrated that any of the coal ash litigation expenses merit inclusion in the rates that may be established by the Commission in this DEC proceeding.

**Q. WHAT IF A LEGAL FORUM HAVING JURISDICTION OVER DEC RULES THAT THE MASSIVE DEC COAL ASH DISCHARGE IN NORTH CAROLINA WAS THE RESULT OF DEC MANAGEMENT FAILURE?**

1    **A.**           DEC has the legal obligation to file any existing orders or decisions relating to coal  
2           ash matters with the Commission. Sound regulatory policy should require the review of  
3           specific positions by DEC and in related litigation proceedings before the Commission has  
4           a basis to make final regulatory decisions on what coal ash related litigation costs or  
5           expenses, if any, should be included in DEC rates in South Carolina.

6    **Q.    DOES ORS RECOMMEND THE COMMISSION APPROVE RATES WHICH**  
7           **INCLUDE THE ADVERSE COST IMPACTS RESULTING FROM POOR DEC**  
8           **MANAGEMENT DECISIONS?**

9    **A.**           As a general matter, ORS believes the only sound regulatory policy answer is no.  
10           ORS recommends the Commission review and consider all relevant management and legal  
11           factors. In this evolving regulatory environment and concerns from the General Assembly  
12           clearly point to the conclusion that Company management will not be rewarded for failure  
13           to comply with federal and state laws.

14   **Q.    DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?**

15   **A.**           Yes, it does.

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